71-373

FILE

Supreme Court of the United States

LE COPY October Term, 1971

No. A-83

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

STANFORD E. PARRIS, ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

CLIVE L. DUVAL, 2D, ET AL.,

Appellees.

On Direct Appeal from the United States District Court
for the Eastern District of Virginia

MOTION TO DISMISS AND APPENDIX

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CITY OF VIRGINIA BEACH,

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CLIVE L. DuVAL, 2D, ET AL.,

Appellees.

On Direct Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO DISMISS

The appellee, City of Norfolk, moves the court to dismiss the appeal herein on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and that the appellant, City of Virginia Beach, intervened into this action for the sole purpose of protecting the integrity of the 1970 decennial census and did not wish to be heard on the issue of legislative reapportionment until after the trial court's written opinion was filed and an interlocutory order was entered.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute.

This appeal raises the question of the validity of the Virginia reapportionment plan which was held to be unconstitutional as contained in Chapter 116, Acts of Assembly of 1971, setting forth a reapportionment plan for the House of Delegates, and Chapter 120, as amended and reenacted by Chapter 246, Acts of Assembly of 1971, setting forth a reapportionment plan for the Senate. Said acts appear in the joint appendix filed by the appellant at pages 27-43.

B. The Proceedings Below.

The General Assembly of Virginia reapportioned its electoral districts on March 1, 1971. Thereafter, three suits were filed, two, DuVal v. Prichard and Parris v. Prichard, attacked the reapportionment scheme of the House of Delegates and one, Howell v. Mahan, attacked the reapportionment scheme of the Senate.

When the issue was raised whether the City of Norfolk should be able to include naval personnel as residents who are stationed aboard naval vessels whose home port is Norfolk and thus entitling Norfolk to seven (7) rather than six (6) delegates, the City of Norfolk intervened.

The City of Virginia Beach, thereafter, also intervened, but it only addressed itself to the limited issue of whether the 1970 decennial census was a constitutional basis for legislative apportionment. (See City of Virginia Beach's Petitions to Intervene in appendix herein.)

Other parties intervened as plaintiffs and defendants, up to, and including the date of trial, May 24, 1971.

Virginia, being one of the states singled out under the Voting Rights Act of 1965, 42 U.S.C.A. Sec. 1973, et seq., submitted its reapportionment plan to the U.S. Attorney General as provided under Sec. 1973(c) of said Voting Rights Act. On May 7, 1971, the legislature was informed that the U.S. Attorney General would not approve said reapportionment legislation.

On the trial date, May 24, 1971, the trial court would not hear the case on its merits, holding it had no jurisdiction. (See "Order on First Hearing," appellant's appendices 43-46.)

However, after the decision of *Whitcomb* v. *Chavitz,* 39 U.S. Law Week 4666 (U.S., June 7, 1971), the U.S. Attorney General's office withdrew its objections to the Virginia legislature reapportionment plan.

At the second hearing on June 16, 1971, during arguments, Delegate James M. Thomson, an intervenor in the case and also Chairman of the House of Delegates' Privileges and Elections Committee, informed the trial court that the House of Delegates had been given every opportunity to amend its plan between the first hearing on May 24, 1971 and the second hearing, in an effort to correct the alleged unconstitutional deviations that had been set out in the various complaints filed in the two house suits in issue. Mr. Thomson was instructed to furnish the trial court other reapportionment schemes submitted but not adopted by the House of Delegates.

Also at the second hearing on June 16, 1971, during the argument of the appellee, Senator Howell, in the case of Howell v. Mahan, Senator Howell told the trial court that he had made great effort to have the Senate correct the alleged unconstitutional defects, but that the senate also had refused to take any action.

It is apparent because of said arguments of parties, Thomson and Howell, the trial court concluded the General Assembly had been given sufficient opportunity to devise a constitutional reapportionment scheme. But because of the General Assembly's refusal to act, the trial court decided to enact a plan which had minimal population deviations and which was not based upon the principle of maintaining traditional political subdivisions.

II.

ARGUMENT

The Appellant, City Of Virginia Beach, Is Untimely In Its Interest In The Issue Of The Number Of Delegates Assigned To It.

As reflected in the trial court's order denying a rehearing to the City of Virginia Beach on pages 26 and 27 of the appellant's appendix, the City of Virginia Beach was one of the intervenors in the three suits and elected to take part in the cases on the limited issue of whether the 1970 decennial census was a constitutional basis upon which the General Assembly of Virginia based its 1970 legislative reapportionment.

Every opportunity was afforded the City of Virginia Beach to be heard on all issues. It declined to do so until after the trial court's decision.

The appellant's motion for rehearing pursuant to Rule 60(b)1, Federal Rules of Civil Procedure, that the City of Virginia Beach was surprised by the order, is astonishing inasmuch as the main issue at the trial was legislative apportionment.

The law is well settled that a party to a law suit cannot go beyond the issues set out in its pleadings. Accordingly, the City of Virginia Beach is bound by its pleading to the issue

of the integrity of the 1970 decennial census. 41 Am. Jur. (Pleading, Sec. 374) P. 550.

The Case Presents No Substantial Question Not Previously Decided By This Court.

Since the case of *Reynolds* v. *Sims,* 377 U.S. 533 (1964), the law has been well settled, to wit: "Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state." At page 579.

The trial court's ruling in the two house cases, DuVal v. Prichard and Parris v. Prichard, was that the house's apportionment scheme, attempting to maintain traditional boundaries of political subdivisions, caused a 16.4% overall population variance and did not meet constitutional standards.

Accordingly, the court saw fit to adopt its own plan after being informed of the General Assembly's failure to do so. This plan, not including the Forty-Sixth House Legislative District, has an overall population variance of only 7.2%.

In attempting to "make a good faith effort to achieve precise mathematical equality" in legislative representation (*Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969) Pp. 530-531), discounting traditional political subdivision boundaries, it is obvious in Virginia that two or more political subdivisions would have to be combined in some election districts.

These combinations providing equal representation which the court felt compelled to make, are discretionary. If the court's act of redistricting was correct, then no political subdivision should have standing to object.

It is ironic that the City of Virginia Beach suggests as an available alternative to place some citizens of Norfolk in Virginia Beach. It evidently contends this is constitutionally permissible.

III.

CONCLUSION

Wherefore, appellee, City of Norfolk, respectfully submits that the City of Virginia Beach should not be permitted to raise its objection to the trial court's decisions for the reasons stated herein and that the questions upon which this cause depend are so unsubstantial as not to need further argument and appellee, City of Norfolk, respectfully moves the court to dismiss this appeal.

Respectfully submitted,

GORDON B. TAYLOE, JR.
Assistant City Attorney
Counsel for Appellee,
City of Norfolk

LEONARD H. DAVIS
City Attorney

GORDON B. TAYLOE, JR.
Assistant City Attorney
Room 908, City Hall Building
Civic Center
Norfolk, Virginia 23501

Counsel for the Appellee,
City of Norfolk

CERTIFICATE OF SERVICE

I, Gordon B. Tayloe, Jr., counsel for the City of Norfolk and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Motion to Dismiss, in the United States Mails, first class postage prepaid, this 8th day of October, 1971, ad-

dressed to The Honorable Andrew P. Miller, Supreme Court Building, Richmond, Virginia 23219; James M. Thomson, Esquire, P.O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esquire, 1425 H Street, N.W., Suite 822, Washington, D.C. 20005; Stanford E. Parris, Esquire, 4085 Chain Bridge Road, Fairfax, Virginia 22030; Harry Frazier, III, Esquire, 700 East Main Street, Richmond, Virginia 23219; C. Stanley Dees, Esquire, 314 North Pitt Street, Alexandria, Virginia 22314; Robert L. Weinberg, Esquire, 1000 Hill Building, Washington, D.C. 20006; The Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, P.O. Box 1531, Norfolk, Virginia 23501; The Honorable R. F. Horan, Jr., Commonwealth's Attorney of Fairfax County, Fairfax, Virginia 22030; The Honorable Henry E. Howell, Jr., 808 Maritime Tower, Norfolk, Virginia 23510; The Honorable Peter K. Babalas, 210 Rotunda Building, Norfolk, Virginia 23510; The Honorable Henry L. Marsh, III, Hill, Tucker and Marsh, 214 East Clay Street, Richmond, Virginia 23219; Armand Derfner, Esquire, 520 Woodward Building, 733 15th Street, N.W., Washington, D.C. 20005; Benjamin W. Dulany, Esquire, 822 Southern Building, Washington, D.C.; C. V. Spratley, Jr., Esquire, P.O. Box 575, Newport News, Virginia 23607; and The Honorable David L. Norman, Acting Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530.

GORDON B. TAYLOE, JR.
Assistant City Attorney
Counsel for Appellee,
City of Norfolk

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

CIVIL ACTION No. 105-71-N

HENRY E. HOWELL, JR., et al.,

Plaintiffs,

v.

JOAN S. MAHAN, et al.,

Defendants.

ANSWER OF THE INTERVENOR, CITY OF VIRGINIA BEACH TO THE PLAINTIFFS' COMPLAINT

Now comes the intervenor, City of Virginia Beach, and for answer to the plaintiffs' complaint filed herein, says:

1. That it admits the allegations contained in paragraphs numbered I, II, III, IV, V, VI, VII, VIII and IX of the complaint.

2. That it denies the allegations contained in paragraph numbered X of the complaint.

3. That as to the allegations contained in paragraph numbered XI:

It admits the allegations contained therein, although it avers that they are allegations of law and need not be answered.

4. That as to the allegations contained in paragraph numbered XII:

a. Norfolk is entitled to 2.65 Senators rather than 2.64 Senators as alleged;

b. It admits the remaining allegations.

5. That as to the allegations contained in paragraphs numbered XIII, XIV and XV of the complaint:

a. It denies the allegations contained therein;

b. It further asserts that the official Bureau of Census, U.S. Department of Commerce, population figures are a constitutional criterion upon which the General Assembly of the Commonwealth of Virginia can legislatively apportion its membership.

6. That it denies the allegations contained in paragraphs numbered XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI and XXVII of the complaint.

FIRST DEFENSE

That it specifically avers that the official Bureau of Census, U.S. Department of Commerce, population figures are a constitutional criterion upon which the General Assembly of the Commonwealth of Virginia can legislatively apportion its membership.

CITY OF VIRGINIA BEACH

By /s/ J. Dale Bimson
J. DALE BIMSON
City Attorney

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

CIVIL ACTION No. 105-71-N

HENRY E. HOWELL, JR., et al.,

Plaintiffs,

v.

JOAN S. MAHAN, et al.,

Defendants.

PETITION FOR LEAVE TO INTERVENE

Now comes the City of Virginia Beach, a municipal corporation chartered under the laws of Virginia, and moves the Court by proper order to make it a party defendant in the above styled suit, and as grounds for such petition avers:

1. That the Bureau of Census, U.S. Department of Commerce, has certified that its 1970 census reflected the population of the City of Virginia Beach, Virginia, to be 172,106.

2. That the plaintiff in his complaint prays this Court to rule that said 1970 population figure is not accurate as a basis for the Legislature to apportion the number of seats within the Senate of the General Assembly of Virginia.

3. That if the official population figures certified by the Bureau of Census, U.S. Department of Commerce, are deemed to be an unconstitutional criterion upon which the General Assemply could apportion its members for the

reasons alleged in the complaint, the City of Virginia Beach would be materially affected in the following way:

Certain Federal and State funds based upon the population figures of the Bureau of Census, U.S. Department of Commerce, would be reduced.

Consequently, the petitioner is a necessary party pursuant to Rule 24(a), Rules of Federal Civil Procedure and is vitally interested in the defense of this case.

Wherefore, your petitioner asks leave to intervene as a party defendant in this action; that it be allowed to defend this action as such; and that the Court grant such other and further relief as the Court may deem proper.

CITY OF VIRGINIA BEACH

By /s/ J. Dale Bimson
J. DALE BIMSON
City Attorney

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

CIVIL ACTION No. 105-71-N

HENRY E. HOWELL, JR., et al.,

Plaintiffs,

v.

JOAN S. MAHAN, et al.,

Defendants.

ORDER

This matter having come upon notice and petition for leave to intervene filed on behalf of the City of Virginia Beach, and

For good cause shown, it is

ORDERED that the City of Virginia Beach be made a party defendant and to file such pleadings as it deems necessary, but such intervention shall not serve to enlarge or extend any discovery cut-off dates or hearing date heretofore established.

Enter: April 16, 1971

/s/ John A. McKenzie
United States District Judge

Norfolk, Virginia

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

CIVIL ACTION No. 174-71-R

CLIVE L. DUVAL, II, et al.,

Plaintiffs,

v.

EDGAR A. PRICHARD, et al.,

Defendants.

PETITION FOR LEAVE TO INTERVENE

Now comes the City of Virginia Beach, a municipal corporation chartered under the laws of Virginia, and moves the Court by proper order to make it a party defendant in the above-styled suit, and as grounds for such petition avers:

1. That the Bureau of Census, U.S. Department of Commerce, has certified that its 1970 census reflected the population of the City of Virginia Beach, Virginia, to be 172,106.

2. That within this population figure of 172,106 are included approximately 5,565 Navy and Coast Guard personnel who are counted for purposes of the census on board vessels home-ported in Virginia Beach.

3. That the plaintiffs seek to invalidate the manner in which Navy and Coast Guard personnel are enumerated in the population figure of the Bureau of Census.

4. That if the manner in which Navy and Coast Guard personnel are enumerated in the population figures of the Bureau of Census is invalidated the City of Virginia Beach would be materially affected in the following way:

Certain Federal and State funds based upon the population figures of the Bureau of Census, U.S. Department of Commerce, would be reduced.

Consequently, the petitioner is a necessary party pursuant to Rule 24(a), Rules of Federal Civil Procedure and is vitally interested in the defense of this case.

Wherefore, your petitioner asks leave to intervene as a party defendant in this action; that it be allowed to defend this action as such; and that the Court grant such other and furher relief as the Court may deem proper.

CITY OF VIRGINIA BEACH

By /s/ Harry Frazier, III
HARRY FRAZIER, III
Special Counsel for the City
of Virginia Beach

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

CIVIL ACTION No. 174-71-R

CLIVE L. DUVAL, II, et al.,

Plaintiffs,

v.

EDGAR A. PRICHARD, et al.,

Defendants.

ORDER

This matter having come upon notice and petition for leave to intervene filed on behalf of the City of Virginia Beach, and

For good cause shown, it is

ORDERED that the City of Virginia Beach be made a party defendant and to file such pleadings as it deems necessary, but such intervention shall not serve to enlarge or extend any discovery cut-off dates or hearing date heretofore established.

Enter: 4-28-71

/s/ Robert R. Merhige, Jr.
United States District Judge

Richmond, Virginia